

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**LOGISTICARE SOLUTIONS, INC. a subsidiary  
OF PROVIDENCE SERVICE CORPORATION**

**and**

**Case No. 16-CA-134080**

**KATHERINE A. LEE, An Individual**

*Linda Reeder, Esq., Counsel for the General Counsel.*

*Lawrence McNamara, Esq., Ford Harrison, LLP, Counsel for the Respondent.*

**DECISION**

**Statement of the Case**

**Joel P. Biblowitz, Administrative Law Judge:** The parties herein waived a hearing and submitted this case directly to me by way of a Joint Motion and Stipulation of Facts received on March 9, 2015. The Complaint, which issued on November 25, 2014<sup>1</sup> and was based upon a charge and a first amended charge filed on August 4 and September 17 by Katherine Lee, alleges that Logisticare Solutions, Inc., a subsidiary of Providence Service Corporation, herein called Respondent, promulgated and maintained Jury and Class and Collective Action waivers that employees and prospective employees were required to sign, and it is alleged that requiring employees and applicants for employment to sign and agree to these waivers violates Section 8(a)(1) of the Act.

The Joint Motion and Stipulation of Facts provides as follows:

1. The charge in this proceeding was filed by the Charging Party, Katherine E. Lee on August 4, and a copy was served by regular mail on the Respondent on August 5.
2. The first amended charge in this proceeding was filed by Lee on September 17 and a copy was served by regular mail on Respondent on the same date.
3. On November 25, the Regional Director for Region 16 of the National Labor Relations Board issued a Complaint and Notice of Hearing, and a copy was served by mail on Respondent and Charging Party on the same day.
4. Respondent electronically filed an Answer on December 9.
5. The Regional Director issued an Order Postponing the Hearing Indefinitely on February 26, 2015.
6. At all material times, Respondent has been a Delaware limited liability company with an office and place of business located in Austin, Texas and has been engaged in the business of arranging transportation for Medicare patients.

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<sup>1</sup> Unless indicated otherwise, all dates referred to herein relate to the year 2014.

7. In conducting its operations during the last twelve months, Respondent performed services valued in excess of \$50,000 in states other than the State of Texas.

5 8. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

9. Ruby Stephens formerly held the position of Respondent's Human Resources/ Training Manager from February 2, 2012 until July 1, 2014 and during those times was a supervisor within the meaning of Section 2(11) and an agent of Respondent within the meaning of Section 2(13) of the Act.

10. Since about March 4, 2014, Respondent has maintained the following rule in its new employee packet:

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**Jury and Class/Collective Action Waiver**

**Jury Waiver:**

20 Jury trials add unnecessary expense and time to a legal process that is already too expensive and slow. Your signature below indicates that you understand that as a condition of your application and possible employment, any lawsuit that you may bring against the company will be decided by a judge, without a jury. To the extent permitted by law, you are knowingly, voluntarily, and intentionally waiving any right you may have to a trial by jury in any litigation arising out of your employment with the company.

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**Class Action and Collective Action Waiver:**

30 Class and Collective Action lawsuits have been abused recently by trial lawyers forcing American companies to pay large settlements, not because the cases have merit or because the Company violated any laws, but because the suits are too expensive to litigate and the company is left with no reasonable alternative. Class and collective action suits primarily benefit the trial lawyers and rarely accomplish any other objective. There are more effective ways to protect your individual employment related rights than through a Class and Collective action lawsuit. Your signature on this document indicates that you agree to waive any right you may have to be a member of a Class and Collective action lawsuit against the company.

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**I hereby acknowledge and understand that as a condition of my employment:**

40 **\*I am waiving my right to have a trial by jury to resolve any lawsuit related to my application or employment with the Company.**

**\*I am waiving my right to participate as a member of a Class or Collective action lawsuit and/or serve as a class representative of similarly situated employees in any lawsuit against the Company.**

45 1. Respondent requires that job applicants, such as the Charging Party, sign the Jury and Class/Collective Action Waiver found in its new employee packet before beginning employment.

12. Respondent maintains an abbreviated form of the above-referenced Jury and Class/Collective Action Waiver in its Employee Handbook. The rule in the Employee Handbook reads:

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## 2.9 Jury and Class Action Waiver

Jury trials add unnecessary expense and time to a legal process that is already expensive and slow. It is important that each employee understand that the Company requires all employees, as a condition of employment, to agree that any lawsuit that you may bring against the Company will be decided by a judge, without a jury. As an employee with our Company, to the extent permitted by law, you are knowingly, voluntarily, and intentionally waiving any right you may have to a trial by jury in any litigation arising out of your employment with the Company.

The Company also requires all employees as a condition of employment to waive any right you may have to be a member of a Class or Collective action lawsuit or a representative of a Class or Collective action lawsuit against the Company.

13. Respondent maintains its Jury and Class Action Waivers at all of its locations including:

- (a) 12234 North Interstate 35, Austin, TX78753;
- (b) 798 Park Ave. NW, Suite 600, Norton, VA 24273-1986;
- (c) 711 N. Jefferson St., Suite C, Albany, GA 30349-8607;
- (d) 503 Oak Place, Suite 550, Atlanta, GA 30349-8607;
- (e) 401 Mall Blvd., Suite 202A, Savannah, GA 31406-4867;
- (f) 777 Southland Dr., suite 235, Hayward, CA 94545-1564;
- (g) 823 NW 12<sup>th</sup> St., Suite 109, Miami, FL 33126;
- (h) 8405 Colesville Rd., Silver Spring, MD 20910-3317;
- (i) 515 Main St. Suite 2, Wallingford, CT 06492-1736;
- (j) 3718 Northern Blvd., Long Island City, NY 11101-1631;
- (k) 1275 Peach St. NE, Suite 600, Atlanta, GA 30309-7517;
- (l) 400 S. Farrell Dr., Suite 209, Palm Springs, CA 92262-7964;
- (m) 2114 Angus Rd., Suite 200, Charlottesville, VA 22901-2770;
- (n) 2552 W. Erie Dr., Suite 101, Tempe, AZ 85282-3100;
- (o) 170 Weston St., Hartford, CT. 06120-1512;
- (p) 5649 S. Laburnum Ave., Richmond, VA; and
- (q) 7441 Lincoln Way, Suite 225, Garden Grove, CA 92841-1447.

14. The parties stipulate that Respondent maintains the above-referenced Jury, Class Action and Collective Action Waiver.

15. Respondent communicates with its employees concerning matters pertaining to wages, hours and other terms and conditions of employment by email and maintains an intranet or employee portal through which it also communicates with employees about wages, hours and other terms and conditions of employment.

16. The issue presented in this case is:

Whether, under the facts of this case, Respondent's maintenance of a Jury, Class Action and Collective Action Waiver interferes with employees' Section 7 rights to participate in collective and class litigation, interferes with employees' access to the Board and its processes, and restricts employees' abilities to discuss their terms and working conditions with one another, in violation of Section 8(a)(1) of the Act.

### Analysis

The Respondent's Class and Collective Action Waiver falls within the realm of *D.R. Horton*, 357 NLRB No. 184 (2012), *Murphy Oil, USA, Inc.*, 361 NLRB No. 72 (2014), and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27 (2015). *Horton* applied the test as set forth in *Lutheran-Heritage Village- Livonia*, 343 NLRB 646 (2004), which stated that the initial inquiry is whether the rule at issue explicitly restricts activities that are protected by Section 7 of the Act; if so, it is unlawful. If not, the finding of a violation is dependent upon a showing of one of the following: employees would reasonably construe the rule to prohibit protected activity or the rule has been applied to restrict the exercise of this activity. The Board, in *Horton*, found that "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial" as a condition of employment (slip opinion at p. 12). In *Murphy Oil, supra*, at page 2, the Board stated that although *Horton* was rejected by the U.S. Court of Appeals for the Fifth Circuit and was viewed as unpersuasive by the Second and Eighth Circuits: "We have independently reexamined *D.R. Horton*, carefully considering the Respondent's arguments, adverse judicial decisions, and the views of our dissenting colleagues. Today we reaffirm that decision. Its reasoning and result were correct..." As these decisions are still Board law, even though some courts have disagreed, until the Board or the Supreme Court rule differently, I am constrained to follow the precedent set forth in these decisions. Counsel for the Respondent defends that its waiver provisions are focused on juries, courts and, principally lawsuits, and therefore do not prohibit access to the Board. Counsel argues in his brief that that there is no ambiguity or inconsistency in Respondent's rules and that employees could not reasonably believe that the required waivers would prohibit him/her from filing an unfair labor practice charges with the Board. I disagree and find that the average lay person could not reasonably be expected to discern the difference between lawsuits and Board proceedings. *D.R. Horton*, enf. denied in part, 737 F.3d, 344, 363 (5<sup>th</sup> Cir. 2013). I therefore find that as the Class and Collective Action Waiver bars its employees from collectively pursuing litigation of employment claims, and that its employees could reasonably assume that it also bars them from filing charges with the Board, it violates Section 8(a)(1) of the Act.

The Jury Waiver that the Respondent requires of its employees and applicants for employment, states that "...any lawsuit that you may bring against the company will be decided by a judge, without a jury. To the extent permitted by law, you are knowingly, voluntarily, and intentionally waiving any right you may have to a trial by jury in any litigation arising out of your employment with the company." Unlike the required waiver of class or collective actions, I am unaware of any case finding the right to have a trial by a jury, rather than a judge, to be protected conduct under the Act, and Counsel for the General Counsel does not cite any such cases in her brief. Under *Lutheran-Heritage, supra*, the initial inquiry is whether this rule explicitly restricts activities protected by Section 7 of the Act. The Jury Waiver does not affect

any collective right; it speaks only of individual employees waiving his/her right to a trial by a jury, and I fail to see how trials before a jury, rather than a judge, is protected by Section 7 of the Act. Completing the analyses under *Lutheran-Heritage*, I find that employees would not reasonably construe this waiver to prohibit protected activity, and there is no evidence that this rule has been applied to restrict that activity. I therefore find that the Jury Waiver does not violate Section 8(a)(1) of the Act, and recommend that this allegation be dismissed.

### Conclusions of Law

1. The Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. By maintaining and enforcing a provision in its Employee Handbook whereby its employees and applicants for employment waived the right to engage in class or collective action with other employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

3. Respondent has not violated the Act as further alleged in the Complaint.

### Remedy

Having found that the Respondent has violated the Act by maintaining a rule prohibiting class and collective action, I recommend that Respondent be ordered to cease and desist from enforcing this policy, and to post the Board Notice set forth below at each of its locations where the restriction is in effect. Further, I recommend that Respondent be ordered to notify all judicial panels, if any, where it has attempted to enjoin, or otherwise prohibit, employees from bringing or participating in class or collective actions, that it withdrawing these objections and that it no longer objects to such employee actions.

Upon the foregoing findings of fact, conclusions of law and based upon the entire record, I hereby issue the following recommended<sup>2</sup>

### ORDER

The Respondent, Logisticare Solutions, Inc., a subsidiary of Providence Service Corporation, its officers, agents, successors and assigns, shall

1. Cease and desist from:

(a) Prohibiting its employees and applicants for employment from filing unfair labor practice charges with the Board or participating in class and collective actions against the Respondent.

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<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Notify all employees and applicants for employment at locations where the restriction is in effect, that it will no longer maintain or enforce the prohibition of class and collective actions against the Respondent referred to in the employee handbook.

(b) Notify judicial panels, if any, where the Respondent has attempted to enjoin or otherwise prohibit employees from bringing or participating in class or collective actions that it is withdrawing those objections and that it no longer objects to such employee actions.

(c) Within 14 days after service by the Region, post at each of its facilities where the Dispute Resolution Policy is maintained or enforced, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 16 , after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

**IT IS FURTHER ORDERED** that the Complaint be dismissed insofar as it alleges violations of the Act not specifically found.

**Dated, Washington, D.C April 15, 2015**

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**Joel P. Biblowitz**  
**Administrative Law Judge**

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

**APPENDIX**

**NOTICE TO EMPLOYEES**

**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

**WE WILL NOT** maintain or enforce a rule that prohibits our employees, or applicants for employment, from participating in a class or collective action lawsuit against us or from filing unfair labor practice charges with the Board and **WE WILL NOT** in any like or related manner interfere with, restrain or coerce our employees in the rights guaranteed them by Section 7 of the Act.

**WE WILL** rescind our requirement that employees, and applicants for employment, agree to waive their right to participate in class or collective action lawsuits against us, and **WE WILL** amend our employee handbook to withdraw this restriction and **WE WILL** notify all employees or applicants for employment that this has been done.

**LOGISTICARE SOLUTIONS, INC., a subsidiary of PROVIDENCE SERVICE CORPORATION**  
**(Employer)**

Dated \_\_\_\_\_ By \_\_\_\_\_  
**(Representative)** **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

819 Taylor Street, Room 8A24

Fort Worth, Texas 76102-6178

Hours: 8:15 a.m. to 4:45 p.m.

817-978-2921.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/16-CA-134080](http://www.nlr.gov/case/16-CA-134080) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14<sup>th</sup> Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 817-978-2925.